
In the Supreme Court of the United States

OCTOBER TERM, 1991

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, PETITIONER

v.

AVECOR, INC., AND NATIONAL LABOR
RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board, in determining whether a bargaining order is necessary to remedy unfair labor practices committed by an employer during a union election campaign, is required to consider evidence of employee turnover subsequent to the unfair labor practices.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 931 F.2d 924. The decision and order of the National Labor Relations Board (Pet. App. 36a-123a) is reported at 296 N.L.R.B. No. 94.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1991. A petition for rehearing was denied on July 3, 1991. Pet. App. 29a. The petition for a writ of certiorari was filed on October 1, 1991. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1987, petitioner Oil, Chemical and Atomic Workers International Union (Union) began a campaign to organize approximately 30 employees of a Tennessee chemical pigment plant operated by respondent Avecor, Inc.¹ Pet. App. 41a-42a. By April 27, a majority of the employees had signed cards authorizing petitioner to represent them. *Id.* at 102a. A representation election was held in late June 1987; petitioner lost by a vote of 10 to 22, with 5 challenged ballots. *Id.* at 40a & n.2.

Petitioner filed unfair labor practice charges and election objections that were consolidated for hearing before an administrative law judge. The ALJ found that respondent had committed multiple violations of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), including threats of plant closure, stricter enforcement of rules, reduced favors, implicit and explicit promises of benefit to discourage union support, and coercive interrogations. The ALJ also found that respondent had violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by discharging two employees because of their union support. Pet. App. 36a-37a, 114a-115a.

The ALJ recommended that the election be set aside and a *Gissel* bargaining order issue.² Pet. App. 99a-

¹ The caption of the petition for certiorari incorrectly identifies Avecor, Inc., as the petitioner and the Union as an intervenor. In fact, the Union is the petitioner and Avecor, Inc., is a respondent. In this brief, "respondent" refers to Avecor, Inc.

² In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Court held that the Board could impose a bargaining order

100a. The ALJ found that the two discharges and the threat of plant closure were "hallmark" violations, *id.* at 111a-112a, and that the threat of stricter rule enforcement and the promise of higher wages were only "slightly less serious." *Id.* at 112a. The violations were found likely to have a "substantial and lasting impact on employee free choice" because they were committed primarily by "higher management officials," the unit was small, and "most of the unit employees were directly affected." *Id.* at 110a, 111a, 112a, 113a. The ALJ refused to consider respondent's argument that, by the time the hearing closed, the bargaining unit had changed significantly as a result of growth and turnover. *Id.* at 110a n.28.

The Board adopted the ALJ's recommended remedy and ordered respondent to bargain with petitioner. Pet. App. 37a, 118a.

2. The court of appeals affirmed the Board's unfair labor practice findings except for the finding that employee Hamby was unlawfully discharged. Pet. App. 9a-10a. In addition, although the court affirmed the finding of a plant closure threat, it rejected the Board's characterization of the threat as a "hallmark" violation, noting that the threat was made by one supervisor to one employee, in response to a direct question. *Id.* at 12a-13a, 20a-21a. The court declined to enforce the *Gissel* bargaining order on the ground that "a significant question is presented whether the

instead of holding a rerun election in two categories of cases: (1) where an employer committed "'outrageous' and 'pervasive'" unfair labor practices, and (2) in cases marked by less pervasive unfair labor practices which nevertheless "have the tendency to undermine majority strength and impede the election processes." *Id.* at 613-614. See Pet. App. 109a. The ALJ concluded that respondent's unfair labor practices fell into the second *Gissel* category. *Id.* at 110a.

remaining unfair labor practices in this case are serious enough, or pervasive enough, to have the tendency to undermine majority strength and prevent the holding of a fair rerun election." *Id.* at 21a. The court therefore remanded the case to the Board to determine whether the remaining violations justify a bargaining order. *Ibid.*

The court further directed that, on remand, the Board should consider the evidence of employee turnover that respondent had proffered at the hearing, as well as any subsequent turnover that may have "occurred up to the time [the Board] would issue the new order." Pet. App. 23a. The court observed that "[s]ubstantial changes in the workplace * * * may render * * * untenable" a finding that "the employer has so polluted the electoral process that the wishes of the employees will be better reflected by an old card majority than by a new election." *Id.* at 21a. Although the court acknowledged that the courts of appeals have adopted divergent views as to whether the Board is required to take post-election events into consideration in issuing *Gissel* bargaining orders, and that the District of Columbia Circuit's own decisions have been inconsistent on this point, *id.* at 22a, the court held that "before issuing a category II bargaining order, the Board must carefully consider employee turnover." *Id.* at 23a.

The court stated that, on remand, the Board must determine whether respondent's "actions in the spring of 1987 left so lasting an imprint that a fair rerun election cannot be assured; or whether, to the contrary, 'changes in [respondent's] work force have made a bargaining order now inappropriate, even if one might have been appropriate at some earlier time.'" Pet. App. 24a. The court also asserted that

the Board had not adequately explained why it thought respondent's unlawful conduct was likely to linger or why other remedies would not "cleanse the environment enough to permit a fair election." *Id.* at 25a-26a.

ARGUMENT

The Board's position is that the appropriateness of a bargaining order in category II *Gissel* cases "depends on an evaluation of circumstances when the unfair labor practices were committed." *Eddyleon Chocolate Co.*, 1991-92 NLRB Dec. (CCH) ¶ 16,503, at 31,074 n.28 (Feb. 27, 1991). Accordingly, the Board takes the position that employee turnover—whether it occurs before or after the unfair labor practice hearing—is not a factor relevant to determining whether a remedial bargaining order is appropriate. *Ibid.*; *M.P.C. Plating*, 1989-90 NLRB Dec. (CCH) ¶ 15,775, at 29,745 (June 15, 1989), enforcement denied in relevant part, 912 F.2d 883, 888-889 (6th Cir. 1990); *Salvation Army Williams Memorial Residence*, 293 N.L.R.B. 944 (1989), enforced mem., 923 F.2d 846 (2d Cir. 1990). The Board's position is based upon decisions of this Court holding, in other contexts, that the Board is not required to take account of the current status of a union's majority support in issuing a bargaining order to remedy an unlawful refusal to bargain. See *NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962); *Franks Bros. v. NLRB*, 321 U.S. 702, 704-705 (1944). *Gissel* suggests that the same rule is appropriate where the employer's unfair labor practices make it unlikely that a fair election could be held. Indeed, in *Gissel*, the Court stated that

where an employer has committed independent unfair labor practices which have made the hold-

ing of a fair election unlikely * * * the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. See *NLRB v. Katz*, 369 U.S. 736, 748, n.16 (1962); *NLRB v. P. Lorillard Co.*, 314 U.S. 512 (1942). And we have held that the Board had the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944). We see no reason now to withdraw this authority from the Board.

395 U.S. at 610.

Although the Board's judgment as to the appropriate remedy for unfair labor practices is entitled to deference, see *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-899 (1984), we nevertheless believe that review of the question presented in this case at this time would be premature. Should the Board conclude on remand that a bargaining order is no longer appropriate in view of the court of appeals' rejection of the finding respecting Hamby's discharge and its refusal to treat the supervisor's plant closure threat as a "hallmark violation," the question of employee turnover would become academic. On the other hand, should the Board find that a bargaining order is not warranted in light of the turnover in the unit, petitioner will be able to challenge that finding in the court of appeals and, if it loses there, in this Court. Finally, should the Board reaffirm the need for a bargaining order after considering the impact of employee turnover, and if the court of appeals refuses

to enforce the Board's order, the Board or petitioner will be able to seek this Court's review at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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